2000

J.R. Walker v. Tracy Loan & Trust Company, a corporation as receiver for Walker Brothers Dry Goods Company, a corporation : Brief of Appellant

Utah Supreme Court

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In the Supreme Court
of the State of Utah

J. R. WALKER,
Plaintiff and Respondent,

vs.

TRACY LOAN & TRUST COMPANY, a corporation, as receiver for WALKER BROTHERS DRY GOODS COMPANY, a corporation,
Defendant and Appellant.

Case No. 5338

BRIEF OF DEFENDANT AND APPELLANT

APPEAL FROM THIRD JUDICIAL DISTRICT

STATEMENT OF FACTS.

Walker Brothers Dry Goods, a Utah corporation, operated a large retail department store in Salt Lake City for nearly two generations. It was one of the oldest and leading mercantile establishments of the western section of the United States, and had been owned by the Walker family until November, 1928 (Abstract 71; Renshaw Transcript 53) when E. F. Dreyfous acquired stock control. The plaintiff, J. R. Walker, was elected Presi-

dent and director in 1903 (Abs. 25; Trans. 30) and occupied those positions even after the control of the corporation passed to Dreyfous (Abs. 35; Trans. 38). From 1903 to November, 1928 he was the active head of the business, but after that date, Dreyfous completely ordered its destinies (Abs. 35; Trans. 39) and the plaintiff Walker, was "only a figure head."

Following the entry of Dreyfous into the corporation, the store building of the company in Salt Lake City was remodeled at an expenditure of $320,000.00 (Abs. 35; Trans. 39). Financial difficulties followed which resulted in the appointment of Tracy Loan & Trust Company, a corporation, as equity receiver for the company and its properties by the District Court of the Third Judicial District in and for Salt Lake County on June 25, 1930. The receiver qualified and immediately entered into possession of the assets and business of the company and for a temporary period continued the operation of the department store business.

At least twenty-five years prior to the receivership, the company established a practice of encouraging its employees to "deposit" their surplus funds or savings with the company (Abs. 55; Trans. Renshaw 41). These funds were repayable on demand (Abs. 33; Trans. 36) and the company paid 6% interest per annum (compounded semi-annually) (Abs. 44; Trans. 30). The "deposits" were evidenced by a small book which simply bore the imprint "Walker Brothers Dry Goods Co." (Renshaw Exhibits A and B). No rules or regulations

covering the so-called deposits were printed in the book nor is there any evidence that any regulations ever existed, except a general understanding of the agreement of the company. In 1929 these "deposits" amounted in total to about $41,000.00 (Abs. 56; Renshaw Trans. 41). In 1924 they amounted to $60,514.55 (Abs. 30; Trans. 35). For years the company paid or credited the earned interest on the respective accounts of the employees (Abs. 69; Renshaw Trans. 53). The funds were "withdrawable" on demand of an employee (Abs. 44; Renshaw Trans. 30). (Abs. 33; Trans. 36).

After Dreyfous acquired control of the business these so-called "deposits" were reduced by "repayment" to the "depositors". When the receiver was appointed the total of such "deposits" amounted only to $11,778.78, exclusive of the sum of $2909.85, which latter amount is involved in this action (Abs. 68 and 69; Renshaw Trans. 52) as hereinafter set forth. It also appears that the company employees from time to time received verbal assurances from the control accountant of the company that their funds on deposit were "absolutely safe and if anything ever happened to the store, they would be paid in preference to any one" (Abs. 44; Renshaw Trans. 30; Abs. 73; Renshaw Trans. 56). The accountant claims to have given these assurances to the employees at the instance and under the orders of the plaintiff, Walker, when he was manager of the business and that Dreyfous, after he became manager, also directed that she inform the employees to the same effect.

(Abs. 50; Renshaw Trans. 34). However, there was no written agreement entered into by the company erecting any specific trust fund protecting these "deposits" of the employees, nor attempting to make the "deposits" preferred claims in event of insolvency of the company.

The employees "deposited" their funds from time to time and in each book, which was held by the employee, the amount of the "deposit" was acknowledged. Interest credits were shown in like manner in the books (Renshaw case Exhibits A and B). The funds were received from the employees by the company at its regular cashier's window or were paid to the control accountant at her desk (Abs. 52 and 53; Renshaw Trans. 37, 38 and 39). The "deposits" were never car-marked. (Abs. 54; Renshaw Trans. 40). The company maintained commercial bank accounts in several of the Salt Lake City banks (Abs. 53; Renshaw Trans. 38) and funds of the company received in the operation of its large business and the employee "deposits" were deposited in these banks. (Abs. 53; Renshaw Trans. 38). In making these bank deposits there was no distinction made as to funds received from the employees on "deposit" and the funds representing general income from business operations. (Abs. 53 and 54; Renshaw Trans. 38, 39 and 40). All money that was received at the store of the company was deposited without distinction as to its source. Employees "deposits" were intermingled with general income and deposited (Abs. 63 and 64; Renshaw Trans. 47, 48, 49) in the commercial banks.

The obligations of the company were paid out of the commercial bank deposits of the company. There was no special bank account representing only the funds of employees "deposited with the company, and when an employee desired to "withdraw" funds from the company, he was paid by check drawn on any one of the banking depositories of the company. No special bank account was used for this purpose (Abs. 64; Renshaw Trans. 48 and 49). There was a complete intermingling and confusion of the employees "deposits" with the general funds of the corporation. (Abs. 57; Renshaw Trans. 42) (Abs. 64; Renshaw Trans. 48).

Early in the Walker administration of the company the corporation books showed these employees "deposits" as a liability under the title of "On deposit" (Abs. 47; Renshaw Trans. 33). A certified accountant questioned the practice as partaking of the nature of a banking business, whereupon the ledger account caption was changed to "Cash due Employees". On the balance sheets of the company the amount due all of the employees was always shown as a liability, and it was never represented as a trust fund or a preferred claim (Abs. 27; Trans. 32; Abs. 62; Renshaw Trans. 47). During the Dreyfous administration the practice remained the same, except that there was an individualization of the accounts instead of carrying but one account in the general accounting set of the company. (Abstract 61; Renshaw Trans. 45).

The company, for years, placed its surplus funds

in time certificates of deposits issued and negotiated by the commercial banks with which it did business. (Abs. 31, Trans. 35; Abs. 48, Renshaw Trans. 34). When the credit balances in favor of the company at a particular bank accumulated beyond a certain point, a time certificate of deposit would be secured (Abs. 54; Renshaw Trans. 40; Abs. 58, Renshaw Trans. 43; Abs. 59, Renshaw Trans. 43) from the bank. These time deposit certificates were for six or twelve months (Abs. 58; Renshaw Trans. 43), and they represented excess emmergency funds of the company (Abs. 51; Renshaw Trans. 36). They represented at one time a sum greatly in excess of the company's liability to its employees for their so-called "deposits" (Abs. 58; Renshaw Trans. 43). In 1924 at the time of the company audit, the employees "savings accounts" carried a liability of $60,514.55 (Abs. 30; Trans. 34). The company had time deposits of $42,476.00 (Abs. 31; Trans. 35) a cashier's check of $10,000.00 and a special bank account of $17,083.85. These represented a reserve "to take care of any emergency" (Abs. 33; Trans. 36).

In purchasing these time certificates of deposit the company did not ear-mark funds received from its employees as savings or "on deposit" and buy a special certificate of deposit with such funds (Abs. 54; Renshaw Trans. 40). Such funds went into the company's general bank accounts indiscriminately, along with other funds of the company (Abs. 54; Renshaw Trans. 40), and when the balance at any bank accumulated to a point

as to permit the purchase of a time certificate, the certificate was acquired. (Abs. 54; Renshaw Trans. 40). The certificates carried no indication on their face that they were for any particular purpose. At the time of the appointment of the receiver, no time certificates in favor of the company existed (Abs. 59; Renshaw Trans. 44). They had been previously cashed and the proceeds used by the corporation in its business.

Alice Frye, (also known as Mrs. Alice Young) had for years been employed as a domestic servant in the home of the plaintiff, Walker. She was never an employee of Walker Brothers Dry Goods Company. (Abs. 19, Trans. 25 and 26; Abs. 20, Trans. 26; Abs. 34, Trans. 37). The plaintiff with her consent, placed her savings on "deposit" with Walker Brothers Dry Goods Company in the same manner as if Alice Frye had been an employee of the company. (Abs. 19, Trans. 25; Abs. 34, Trans. 37 and 38). The account was built up on a similar plan as the accounts of the company employees. (Abs. 19, Trans. 25; Abs. 27, Trans. 32). In May 1930 (Abs. 20, Trans. 26; Abs. 34, Trans. 38) and while plaintiff was president and director of the company, he made settlement with Alice Frye and she assigned her claim against the company arising out of the "deposit" of her funds, to the plaintiff (Abs. 34; Trans. 38). The credit balance in favor of Alice Fry at this time approximated the sum of $5,909.85.

The wife of plaintiff at this time was indebted to the company on an open account in the approximate

amount of $3000.00. (Abs. 18, Trans. 24; Abs. 34, Trans. 38). When the plaintiff had acquired from Alice Frye her right and title to the "deposit" claim he went to the control accountant of the company (in May 1930) and ordered her to transfer a sufficient amount from the Alice Frye account to pay and settle the liability of his wife on her account due the company and to hold the balance to his credit with authority for his wife to purchase merchandise against it. (Abs. 18, Trans. 24; Abs. 23, Trans. 28 and 29; Abs. 24, Trans. 29; Abs. 34, Trans. 38). The control accountant transferred approximately $3000.00 from the Frye account (then owned by plaintiff) to the credit of the account of Mrs. J. R. Walker, plaintiff's wife. This paid this account in full (Abs. 18, Trans. 24). Upon this transfer being effected there remained a balance of $2,909.85 to the credit of the plaintiff as assignee of Alice Frye. Thereafter and prior to the appointment of the receiver for the company, the wife of plaintiff became indebted to the company in the sum of $329.98 for merchandise purchased by her. After the appointment of the receiver, the wife of plaintiff became indebted to the receiver in the additional sum of $2,006.03. However, it was stipulated by counsel and found by the trial court (Abs. 79; Trans. 11) that the defendant as receiver, had sold to a third person the accounts against plaintiff's wife and therefore the question of offsetting the total amount due from plaintiff's wife to the receivership estate against plaintiff's claim had been eliminated from the case (Abs. 79;

Trans. 11). No further consideration need be given to this question of offsets.

After the appointment of defendant as receiver of Walker Brothers Dry Goods Company, the plaintiff filed his proof of claim with the said receiver within the time ordered by the court having jurisdiction of the receivership proceedings. Plaintiff in his proof of claim alleged that his claim was preferred and entitled to full payment before the common creditors of the insolvent corporation were entitled to participate in a distribution of the receivership assets. The defendant receiver refused to allow the claim as a preferred claim but approved same as a common claim without preference. Thereupon the court in which the receivership proceedings were and are pending ordered plaintiff to institute and prosecute a plenary action against the defendant receiver to determine if a preference existed in favor of plaintiff which would entitle him to full payment of his claim before common creditors of the receivership estate would be entitled to participate. This present action is the plenary action ordered by the court.

In the receivership proceedings the court ordered the defendant receiver to set up a reserve of cash funds of $11,268.33 to protect the creditors of the receivership estate who are employee "depositors" as herein designated and described, in the event it was finally determined they were entitled to payment of their claims in full. The court further directed the receiver to pay to these creditors claiming preference the same dividends

as were paid common creditors as and when such dividends were paid, without prejudice as to either the receiver or creditors claiming preference. The receiver has carried out the order of the court in all respects. The reserve fund has been created and the employee "depositors" have been paid dividends in the same proportion as paid common creditors. (Abs. 77; Trans. 9).

The trial court in this action found that the assets of Walker Brothers Dry Goods Company are insufficient to pay the general creditors more than approximately 55% of the amount of such claims allowed by the receiver. (Finding XIII, Abstract 80, Trans. 11).

ASSIGNMENTS OF ERROR AND ARGUMENT.

I.

PLAINTIFF IS NOT ENTITLED TO A PREFERENCE OR PRIORITY IN THE PAYMENT OF HIS CLAIM BY THE DEFENDANT RECEIVER, BECAUSE (a) THE TRANSACTION BETWEEN PLAINTIFF AND WALKER BROTHERS DRY GOODS COMPANY INVOLVING THE ALICE FRYE ACCOUNT DID NOT CHANGE A DEBTOR AND CREDITOR RELATIONSHIP BETWEEN PLAINTIFF AND THE COMPANY INTO THAT OF TRUSTEE AND CESTUI QUE TRUST; AND (b) THE SIMPLE CONTRACT DEBT DUE PLAINTIFF, AS ASSIGNEE OF ALICE FRYE WAS NOT CONVERTED INTO A TRUST FUND.

Appellant's Assignments of Error Nos. 1, 2, 3, 4, 5, 8 (a), 9, 10, (a and c), and 11 involve the foregoing propo-

sition. Therefore, as a matter of convenience they may be discussed together. Assignments 2, 3 and 9 are directed against Finding of Fact VI, which is as follows:

> "That prior to the appointment of the defendant, as receiver of Walker Brothers Dry Goods Company, as aforesaid, the plaintiff delivered to and deposited with the said Walker Brothers Dry Goods Company the sum of $2,909.85, upon an express trust, to-wit: that said sum be held and retained by the said Walker Brothers Dry Goods Company for the sole, specific and special purpose, and that only, of securing the payment of and paying for the future goods, wares and merchandise to be purchased by the wife of plaintiff from Walker Brothers Dry Goods store."

Assignments 4 and 5 are directed against Finding of Fact VII, which is as follows:

> "That the said deposit so made by the plaintiff to Walker Brothers Dry Goods Company under the express trust, as aforesaid, was accepted and held by Walker Brothers Dry Goods Company in trust as a special fund or deposit for the specific use and purpose for which it was entrusted to the said Walker Brothers Dry Goods Company, to-wit; for the security, satisfaction and payment of future advances and sales of goods, wares and merchandise by Walker Brothers Dry Goods store to the wife of plaintiff, and not otherwise."

As to each of said Findings, the Appellant asserts that (a) the trial court erred in making the Finding as a matter of law; and (b) that the evidence in the case is

wholly insufficient to support both or either of said Findings.

Assignments 1, 10 (a and c), and 11 each raise the question as to whether or not a trust relationship existed between plaintiff and Walker Brothers Dry Goods Company and also as to whether or not there existed a trust fund or res.

1. ALICE FRYE WAS A SIMPLE CONTRACT CREDITOR OF WALKER BROTHERS DRY GOODS COMPANY. PLAINTIFF AS HER ASSIGNEE, SUCCEEDED TO HER RIGHTS AND ASSUMED HER LEGAL STATUS IN REGARD TO THE FUNDS LOANED BY HER TO THE COMPANY.

The plaintiff on cross-examination was asked:

> "Q. Now, I will ask you to state whether or not this account of Mrs. Young's or Miss Frye's was transferred to you?" (Abs. 34; Trans. 37).

Plaintiff's answer to this question was as follows:

> "A. I had for years and years back, she was our old nurse girl, and I had the handling of this fund, had it long before I put it in the store. I put it in there, I was trustee, and in my last year I had Mrs. Chase transfer it to my account. I didn't want to involve her in any receivership proceedings. I was taking care of this fund for her. I told Mrs. Chase to transfer it to my account and apply enough to clean up Mrs. Walker's account and I would leave the balance there for her account. She was in the habit of running an ac-

count of two or three thousand dollars a year. I could have drawn it out if I had wanted to."

In this testimony is found the origin of the claim which is the basis of this action. The testimony of control accountant, Chase, (Abs. 19 and 20; Trans. 25 and 26) throws further light on Alice Frye's relation to the plaintiff and to the company.

"Q. Do you know, Mrs. Chase, when this Alice Frye account was opened?

A. It must have been before I had the books, I never received any deposits.

Q. Alice Frye and Alice Young are the same person?

A. Yes sir.

Q. Do you know who that lady was?

A. I never seen (sic) her.

Q. Do you know who she was?

A. I knew there was such a person.

Q. She was employed in the home of Mr. Walker?

A. Yes, sir.

Q. As a domestic servant?

A. Yes, sir.

Q. Did you ever accept any money direct from Mrs. Frye?

A. No.

Q. How was money brought there to the credit of her account?

A. Mr. Walker always brought it to the store. I don't think I ever did receive any money on it myself. *I used to figure the interest.*

Q. You never saw Miss Frye or Mrs. Young?

A. I never saw her."

It is obvious from the foregoing evidence that Alice Frye was never an employee of the company. She was a domestic servant in Walker's home. The funds delivered to the company by Walker belonged to Miss Frye and credit was given by the company to her. The account stood in the name of Alice Frye. She was recognized by the company as the principal and with regard to the handling of her money Walker was her agent in dealing with the company. Until Alice Frye assigned her claim to Walker, the company knew only her as the owner of the claim. The contract was between the company and Miss Frye. No matter what Walker may designate the legal status he individually occupied towards Miss Frye in regard to her funds, as between the company and Miss Frye the relation was simply of that of debtor and creditor. She, acting through her agent, Walker, *loaned* the money to the corporation. On the company there rested the contract duty of paying interest on the borrowed funds, and repayment of principal to her on her demand. There was no duty to Walker.

> "It is also elementary law that the principal is entitled to the benefit of a contract made in his name by an authorized agent."

Hartford Distillery Co. v. N. Y. N. H. R. Co., 115 Atl. (Conn.) 488;
Savage vs. Rix, 9 New Hampshire 263;
Stone vs. Wood, 7 Cow. (N. Y.) 453;

Merchants Bank vs. Hayes, 7 Hun. (N. Y.) 530.

The fundamentals of the transactions between Miss Frye and the company clearly demonstrate that she loaned her funds to the company and the company *borrowed* the same from her. The company agreed to pay her interest and did in truth pay interest (Abs. 20; Trans. 26) for the use of her funds. There can be no trust relationship deduced from this agreement to pay interest. In truth the agreement to pay interest connotes a debt—not a trust fund. *"If a man pays interest for money he must be entitled to the use of it. When a man locks up money which is intrusted to him in a box, he does not pay interest on it." In re Broad 13 Queens Bench Division 740.* Miss Frye occupied no different position towards the company than that of the numerous bank creditors, which loaned their funds to the company in consideration of the payment of interest. She was a stranger to the company and the company borrowed *call* money from her. *"Interest is the compensation paid for the use of money. It is allowed on the ground of some contract, express or implied, to pay it, or as damages for the breach of some contract, or the violation of some duty."* Arizona Eastern R. Co. v. Head, 26 Arizona 259; 224 Pac. 1057. *"Interest is the compensation allowed by law, or fixed by the parties, for the use or forebearance of money, or as damages for its detention."* 15 R. C. L. Sec. 1, page 3.

The agreement of the company to pay Miss Frye

interest on her advances to the company, plainly stamps the transaction as one between debtor and creditor. Upon receipt of her funds the company could do what it desired with them. It was not to invest them in a trust fund for her benefit and then pay her interest on them. It was intended that it use them in the company business and pay her interest for such use of her money. Therefore, up to the point when Walker paid Miss Frye the amount of her claim and in return secured her assignment thereof, the corporation was but a simple contract debtor of Miss Frye. She was a simple contract creditor. Walker succeeded to her legal rights and assumed her legal position.

2. WALKER'S TRANSACTION WITH MRS. CHASE, CONTROL ACCOUNTANT OF THE CORPORATION, DID NOT CONVERT THE BALANCE OF THE SIMPLE CONTRACT INDEBTEDNESS FORMERLY OWED BY THE CORPORATION TO MISS FRYE AND THEN OWED TO WALKER, INTO A TRUST FUND, NOR DID IT MAKE THE CORPORATION TRUSTEE OF THE BALANCE OF THE INDEBTEDNESS.

Walker in his testimony quoted above (Abs. 34; Trans. 37) and found on page 12 of this brief, gives us his version of the transaction with Mrs. Chase, the company employee who had charge of these employee loan accounts. Mrs. Chase furnishes correlative evidence on the same subject (Abs. 18; Trans. 24 and 25):

> "A. At this time Mr. Walker asked me to transfer the account of Alice Young Frye from her savings account to pay the account of Mrs.

J. R. Walker and *it left a balance of two thousand dollars, somewhere around that.* He said Mrs. Walker would be charging more merchandise and we would use that to pay the account, use this two thousand to pay the account when her account was that amount."

Q. As I understand it, this Frye account was applied first to the payment of the indebtedness then owing the company by Mrs. Walker.

A. Yes sir.

Q. That was some three thousand dollars.

A. Yes sir.

Q. And that left a balance?

A. Left a balance of somewhere around two thousand dollars.

Q. It was with reference to that balance, Mr. Walker told you to hold it and apply it on the future purchases of Mrs. Walker, was it?

A. Yes sir."

When Walker secured his assignment from Miss Frye, after paying to her the amount of her claim against the corporation, the Fry account was approximately $5,909.85. Mrs. J. R. Walker owed the corporation about $3000.00 on an open account for merchandise sold and delivered to her. This debt due from Mrs. Walker, was paid in full by transferring approximately $3000.00 from the Fry account to the credit of this Mrs. J. R. Walker account. The balance of the Frye account (then owned by Walker) after this transfer, was $2,909.85 and it is this balance which is the subject of this action. According to Walker, he told Mrs. Chase "to transfer it (the Frye account) to my account and apply enough to

clean up Mrs. Walker's account and leave the balance there for her account." Mrs. Chase states that Walker said: "Mrs. Walker would be charging more merchandise and we would use that (the balance of $2,909.85) to pay the account, use this two thousand to pay the account when her account was that amount."

It is upon this transaction and conversation that the plaintiff must rest his case that a trust was created. It will be noted that the plaintiff paid no funds to the company. He and Mrs. Chase dealt only with the balance of the Frye account. Was this balance of the Frye account ($2,909.85) transformed from a simple contract debt into a trust fund? In order to entitle plaintiff to payment in full there must be found in this transaction all of the elements necessary to establish a trust relationship between Walker and the company. We have demonstrated that the relationship between plaintiff's assignor, Miss Frye, and the company, was that of debtor and creditor and that Walker, as her assignee assumed the same position. When he came to Mrs. Chase to deal with this Frye account he was then but a common creditor of the corporation.

The case of *Blakey vs. Brinson,* decided by the Supreme Court of the United States on May 16, 1932 and found in Vol. 52 Supreme Court Reporter 516—Advance Sheet No. 14, June 1, 1932, was an action against the receiver of a national bank. We quote the facts from Mr. Justice Stone's opinion (this was a unanimous decision):

"Respondent maintained an interest-bearing savings account with the bank, in which his credit balance on October 14, 1929, was $1,961.31. Shortly before that date, respondent had had conversations with an officer of the bank, in the course of which the latter signified the willingness of the bank to purchase $4,000 of United States bonds for respondent. On October 10, he stated to respondent that the bank would send to Richmond for the bonds, and asked him to bring to the bank on the 14th such amount, in addition to his credit balance, as would be required to pay for the bonds. On the latter date respondent drew a check for $2,100 upon another bank, which he deposited in his savings account, thus increasing his deposit balance to $4.061.31. On the 15th, the same officer of the bank informed respondent that the bonds had been ordered, and on the 19th said to him, 'I have your bonds', and handed to him a charge slip which stated: 'This is to advise you that we have this day charged your account as follows:

4,000 Fourth L. L. 4¼% Bonds	$3,960.00
Acct. Int.	.60
Commission	4.00
	$3,964.60

On October 21 the bank charged respondent's savings account on its books with $3,964.60, and credited a like amount as a 'deposit' in a 'bond account' appearing on its books. The bond account contained only a daily record of credits in the account of checks and deposits and their total, without any reference to respondent or any other customer of the bank. The nature and purpose of the account does not otherwise appear. When the bank closed its doors on October 26, it was discovered that in fact no bonds had been

purchased, ordered, or received for the respondent. The only transactions had with respect to respondent or his account were the conversations with the officer of the bank and the entry of the debit and credit items mentioned.

On these facts, the District Court concluded that the bank had received $3,964.00 in trust for the purpose of purchasing the bonds, and that, as the funds in the hands of the receiver had been augmented by the wrongful commingling of the trust fund with the other funds of the bank, respondent was entitled to payment in preference to the general creditors of the bank. The Court of Appeals thought that the trust arose only on the 19th, when the bank stated that respondent's account had been charged with the purchase price of the bonds, but reached the same conclusion as respects the increase of the funds in the hands of the receiver and the right of respondent to preferential payment.

The petitioner insists, as matter of law, that no trust ever came into existence as the result of these transactions."

This case is submitted as a conclusive authority in favor of the defendant receiver's position in this case that the Walker-Chase transaction and conversation did not change the balance ($2,909.85) of the Frye account into a trust fund. Justice Stone cogently writes:

"It would have been equally competent for respondent to have provided for the purchase of the bonds either by the creation of a trust of funds in the hands of the bank, to be used for that purpose, *or by establishing a credit to be debited with the cost of the bonds when purchased.* But only if the former was the method adopted could respondent, upon the bank's in-

solvency and failure to purchase bonds, recover the fund or its proceeds, if traceable, in preference to general creditors. * * * The relationship established between the bank and respondent by his savings account was, from its inception, that of debtor and the credit balance of $1,961.31 in respondent's account on October 14 represented the amount of the bank's indebtedness to him. * * * The situation thus created continued without change until the 19th, when the bank's officer advised respondent that the bonds had been purchased. If the advice was true, as respondent believed it to be, he was then called upon to pay to the bank the amount of the purchase price, and the bank proceeded, with the assent of the respondent, to liquidate the supposed obligation by charging his savings account with the exact amount of the stated purchase price, with interest and commissions added. We can find in this method of discharging a supposed obligation no hint of an intended alteration of the debtor and creditor relationship, with which respondent had been content from the beginning, to that of trustee and cestui que trust.

The court below thought that the legal consequence to be attributed to the debiting of the *account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank* under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support.

* * * * * * * *

Such a procedure, if actually carried out, might afford a basis, which is lacking here, for the inference that respondent, no longer content with the role of creditor, had sought to establish

> a trust fund. But the mere debiting of his account, without more, for the reimbursement of the bank for the obligation which it was supposed to have incurred or paid, lends no support to such an inference. The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it."

We quote this decision at length because of the similarity of the legal positions of Walker in the case at bar and of Brinson in the cited case. Both were common creditors when they went to their respective debtors and entered into the transactions which resulted in litigation. Walker desired the credit balance of the Frye account to be used in paying future indebtedness to be incurred by his wife; Brinson desired the credit balance of his savings account to be used in the purchase of Liberty bonds. Walker, if he had desired to create a trust fund, could have secured payment of the balance of the Frye account and then turned it back to the company under a specific agreement; Brinson could have drawn out his funds and created a trust fund to buy bonds. Neither followed a course of action from which it can be inferred that he desired to withdraw from the role of creditor and assume a new one of cestui que trust. Both were satisfied to remain creditors. *They trusted their respective debtors to perform their respective agreements; they depended on their debtors remaining solvent until the agreements were executed. They accepted the promises of their debtors and their apparent financial abilities to perform.* Walker in his testimony uncon-

sciously revealed his correct legal position. After testifying as to his conversation with and instructions to Mrs. Chase (Abs. 34; Trans. 38 and 39) the following colloquy between himself and his counsel occurred (Abs. 35; Trans. 38):

> "Q. You left it (the balance of $2,909.85) there upon the reliance of that statement?
>
> A. Left it there expecting it to be paid on my wife's future purchases.
>
> Q. That is the way you want to apply it now?
>
> A. Yes sir."

Walker relied upon what? The promise of the company (acting through its agent Chase) to apply the balance in satisfaction of future purchases made by Mrs. Walker. Certainly such promise does not create trust relationship; it simply continued the former one of debtor and creditor. Walker's position is even weaker than that of Brinson. In Brinson's case the bank *did debit his account* to reimburse itself for the purchase of bonds which were not in truth made. In Walker's case no debit of the balance of the Frye account was ever made. If as Justice Stone remarks, in Brinson's case, "The cancellation of the credit balance by the debit neither suggests an intention to establish a trust nor points to any identified thing which could be the subject of it," how can it be said the balance of the Frye account standing alone plus the promise of the company to apply it in a given manner changed such credit balance into a

trust fund? The answer, of course, must be in the negative.

The fact that the plaintiff instructed the company to use the credit balance of the Frye account for a particular purpose did not change the legal relationship of the parties in regard to this balance. Walker by his assignment had become a general creditor of the corporation and he so remained. He was content to remain in that role and did not depart from it, and the orders he gave to Mrs. Chase, as company representative, had no affect on this relationship. The credit balance was not paid to him, and by him returned to the company on a specific trust so that particular funds were segregated from the general funds and assets of the company. As further sustaining appellant's position there are cited:

Northern Sugar Corporation v. Thompson, 13 Fed. (2nd) 829;
Noyes vs. First National Bank, 167 N. Y. Supple. 288;
Craig vs. Bank of Granby, 210 Mo. App. 334;
Wetherell vs. O'Brien, 140 Ill. 146;
Mutual Accident Assn. v. Jacobs, 141 Ill. 261.
Fralick v. Coeur D'Alene B. & T. Co., 36 Idaho 108, 210 Pac. 586;
Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252, 17 Law Ed. 785;
Commercial Bank of Penn. v. Armstrong, 148 U. S. 50, 13 Supt. Ct. 533, 37 L. Ed. 363;
Minard vs. Watts, 186 Fed. 242;
Fallgatter vs. Watts, 11 Fed. (2nd) 383;

Phoenix Bank vs. Risley, 111 U. S. 125;
Fidelity Assn. vs. Rodgers, 180 Cal. 683, 182 Pac. 426.

Let it be assumed for purpose of argument that Walker paid over to the company from his own funds the sum of $2,909.85 and that at the time he did so the conversation between him and Mrs. Chase occurred, and that the funds so paid over by Walker were taken into the bank accounts of the company and used by it in the transaction of its business—*all with Walker's knowledge as in the case at bar.* Can it be doubted that he sustained any other relation than that of creditor to the company? The authorities cited in the preceding paragraph are conclusive in supporting the statement he would be only a common creditor. In addition, the Court should *refer* to:

Schenck Chemical Co. vs. Industrial A. and D. Co., 121 N. Y. Supple. 838;
Yorkshire Investment Co. vs. Fowler, et al., 78 Fed. (C. C. A.) 56;
Mahler v. Sanche, 79 N. E. (Ill.) 9;
Tucker vs. Lim, 57 Atlantic (N. J. Equity) 1017;
Reddington vs. Lanahan, et al., 59 Maryland 429.

It should be constantly borne in mind that Walker had positive knowledge that Miss Frye's funds had been intermingled in the company's bank accounts and had been used in the conduct of the company business. He knew the company had set up no trust fund to guarantee

a return of the loans made by Miss Frye to the company. He knew the entire transaction with regard to employee savings and is therefore conclusively charged with having freely assented, after he became the owner of Miss Frye's claim, the prior relation of debtor and creditor be continued.

That one party to a transaction reposes faith and confidence in the other party which is violated or abused is no ground for adjudging that a trust relation existed between them. There are additional elements which must be present before a court of equity is justified in casting the wrong-doer in the role of "trustee." The usual remedies on the law side of the court can be entirely emasculated or destroyed if the measure is simply whether the wrong-doer violated a trust. The breach of a simple contract is, in an ethical sense, the abuse of trust and confidence, but no court has had the hardihood to make the contract breaker a "trustee". In the case at bar, Walker directed the company that the balance of the Frye account should be used to pay his wife's future insurred indebtedness. Plaintiff did not seek in this action to compel such application, but specifically withdraw (with consent of appellants counsel) the right to set off (Abs. 75, Renshaw Trans. 61) Mrs. Walker's indebtedness against the balance of the Frye claim, and rested his action upon the theory that a trust had been created in his favor. Out of the breach of the instructions by the company, plaintiff cannot construct a trust. The authorities do not sustain him in his effort.

"This complaint, in effect alleges, conversion of money by defendant and the facts therein stated utterly fail to bring the case within the domain of equity, as the elements necessary to create the relation of trustee and cestui que trust are not shown to exit. True plaintiff in his complaint designates the money he seeks to recover as a trust fund, but this, however, is only the conclusion of the pleader. The relations of the parties to each other, because of and which grow out of the transaction in question, must be determined by the facts, what they did in the premises and not by what the pleader chooses to label or call it in his pleading."

Francis v. Gisborne, 30 Utah 67, 83 Pac. 571.

"Where one person employs another as an agent, loans money or sells property on credit, a confidence and trust is imposed, to a greater or less extent, and yet such transactions have never been regarded by courts as falling within any recognized class of trusts."

Weer v. Gand, 88 Illinois 490.

"The various affairs of life in almost every act between individuals in trade and commerce involve the reposing of confidence or trust in each other, and yet it has never been supposed that because such a confidence or trust in the integrity of another has been extended and abused, that therefore, a court of equity would in all such cases assume jurisdiction."

Doyle v. Murphy, 22 Illinois 502.

"It is true that uses and trusts are a favored part of the jurisdiction of the chancellor, and frequently he will on that ground, decide in cases

where the law may be adequate to give relief. But, notwithstanding this acknowledged authority, it cannot be extended to every case where one party has trusted another, or in other words, placed a confidence which has been abused. If so, every case of bailment, and every instance of placing chattels, by loans or hire, would be swallowed up by courts of equity. Nay, every case where credit was given for debt or duty, would soon be drawn into the same vortex."

Ashley's Administrators v. Denton 1 Litt. (Ky.) 86.

"Something more than a trust reposed in one is required to make him a 'trustee' according to its intent."

People ex rel. Smith v. Commissioner, 100 N. Y. 215, 3 N. E. 85.

"In almost all of the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act."

Wilson v. Kirby, 88 Illinois 566;
Chapman v. Forsyth, 2 Howard (U. S.) 202.

We make reference to the statement of Justice Folland in the recent decision of the Utah Supreme Court in Tooele County Board of Education v. Hadlock ..... Utah .....; 11 Pacific (2nd) 320 (at page) 323:

"No case has been called to our attention, and none has been found by us, holding that under circumstances such as these a deposit made in a

> bank by means of a check drawn on that bank will not be impressed with a trust where it would have been so impressed had the check been drawn on another bank. It is undisputed that there was in the bank more money than was required to pay the check when it was presented to the bank on Dec. 24, 1930 * * * The transaction was one equivalent to the board demanding and receiving its money and thereafter placing it on deposit in the bank to its credit."

In this case a trust ex maleficio was admitted, if the other requirements of law were met. The above quoted excerpt was in answer to the Bank Commissioner's argument that by reason of the transaction no new money came into the bank and therefore its assets were not increased or augmented. The ruling of the court is correct since it was dealing with the question of augmentation of assets *and not with the question as to whether a creditor had changed his legal status from that of creditor to cestui que trust,* which in the instant case is one of the important issues.

The above quoted ruling in the Tooele Bank case cannot support a contention in this case that since Walker might have received a check for the balance of the Frye account ($2,909.85) and then forthwith endorsed and delivered the check back to the company upon an express trust, that Walker's transaction and conversation with the accountant, Chase, was such a legal equivalent. This was the exact argument advanced by Brinson in the United States Supreme Court case (above cited and discussed at length) to sustain his position

that *his status of creditor had been changed to that of cestui que trust.* The court unanimously denied the soundness of such logic.

There is a definite distinction between the position of the Tooele County Board of Education in its transaction and the position that Walker occupies in this case. These distinctions may be set forth in the following manner:

Tooele County Board	Walker
1—A Trust ex malificio in favor of the Board arose because Sec. 4500 Comp. Laws of Utah, as amended, had been violated by the Board's treasurer and the bank.	1—Walker, as assignee of Miss Frye, was a common creditor of Walker Bros. Dry Goods Co. when he came to deal with Mrs. Chase and give instructions as to the disposition of the Frye account then owned by him.
2—The Board by receiving a check from the county treasurer drawn on the bank and depositing it to the credit of its account in the bank, affirmatively assumed a position, *by operation of said Sec. 4500, as amended,* other than that of creditor. The statute created a trust without regard to the intention of the Board.	2—Walker, after ordering $3000 of the Frye account to be used to pay the then present indebtedness due the company from his wife, took no action from which it can be inferred that he intended to transform his position as creditor, into that of cestui que trust. He simply gave orders as to how the balance due him should be used. He elected to allow the balance to stand to his credit.

3—The deposit of the county treasurers check to the credit of the Board effected a complete change in the ownership of the funds.	3—The balance of the Frye account remained in its previous status, and Walker, after his instructions to Chase, still remained the owner of it.
4—The Court was considering the question of augmentation of assets and its ruling is directed to this point.	4—The court must decide whether Walker changed his position from creditor to cestui que trust.

Particular reference is made to the case of Bledsoe vs. Hammons, 36 Arizona 489; 287 Pac. 297, which was distinguished in Tooele County Board v. Hadlock, supra, as having no application to the situation under consideration. Frederick's actions in that case bear a close similarity to those of Walker in the present case. Neither of them changed their relation in regard to their respective claims *and in each case there was no change in the ownership of the indebtedness.* While rightly ruled out of consideration in the Tooele Bank case, it has a proper application to the situation in the case at bar. Its irrelevancy in the one case makes it in point in the other case.

II.

THERE IS NO EVIDENCE THAT AT THE TIME OF THE APPOINTMENT OF DEFENDANT AS RECEIVER OF WALKER BROS. DRY GOODS CO. THAT THERE CAME INTO ITS HANDS SUMS OF MONEY WHICH

REPRESENTED MISS FRYE'S SO-CALLED "DEPOSITS" IN EITHER THEIR ORIGINAL OR SUBSTITUTED FORM IN EXCESS OF PLAINTIFF'S CLAIM OF $2,909.85 AND THAT THE ASSETS OF THE COMPANY WHICH CAME INTO THE HANDS OF THE RECEIVER WERE AUGMENTED BY AND TO THE EXTENT OF PLAINTIFF'S CLAIM. HENCE FINDING NO. X IS CLEARLY ERRONEOUS AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE SAME.

Assignments of Error Nos. 6 and 7 cover the above proposition.

There is positive evidence in the record as to the methods pursued by the company in handling funds loaned to the company by its employees. They were intermixed with other receipts and funds of the company and were deposited in the company banks. "When it came to making deposits no distinction as to funds representing employees savings and funds representing the sales was made. They were all put together." (Abs. 53; Renshaw Trans. 38 and 39). When the bank balances accumulated to a certain point, time certificates of deposit would be purchased (Abs. 54; Renshaw Trans. 40). No special certificates of deposit were purchased with the employees loans. Time deposit certificates were acquired with bank credits, which contained general receipts of the company and the employee loans. (Abs. 54; Renshaw Trans. 40).

It will be noted that in each instance the funds representing employee loans were deposited in company

banks. There is no evidence that any other disposition or use was ever made of them. The obligations of the company were paid from the common fund at the banks, composed of receipts from all sources. (Abs. 63; Renshaw Trans. 48). Sometime previous to the date upon which the defendant receiver was appointed and assumed control of the company and its properties, the time certificates of deposit had been cashed and the funds used in the company business (Abs. 59; Renshaw Trans. 44). No certificates of deposit existed upon the receiver's appointment. (Abs. 60; Renshaw Trans. 44). The record is silent as to whether on date of appointment of receiver there were balances to the credit of the company at its banks. The defendant in its answer, however, admitted that at the time of its appointment *there came into its hands* sums of money in excess of plaintiff's claims. *However, it will be noted that this admission does not admit that there were funds on deposit in the depository banks of the company. The admission is literal "that there came into its hands sums of money." This is not an admission that there were bank balances in favor of the company, which came under the control and into the possession of the receiver. It is an admission that cash funds not on deposit came into the receiver's possession.*

There is no evidence that these cash funds which the receiver admitted it received contained a penny of money paid in by Alice Frye. Beyond all peradventure they did not, for Walker dealt with Mrs. Chase in May

or early June, 1930, prior to the receivership (Abs. 12; Trans. 20 and 21) as to the Frye account and Miss Frye had made her so called "deposits" long prior to that time. Deposits by the company were made daily (Abs. 53; Renshaw Trans. 38) in its depository banks.

The deductions from this evidence are obvious: (a) the cash funds which came into the receiver's hands contained none of Alice Frye's money, and (b) at date of receiver's appointment there were no credit balances at the banks in favor of the company. Hence Finding X is clearly erroneous and there is not the slightest evidence to support it. The balance of the Frye account in no sense augmented the assets of the company coming into defendants' bank as receiver.

III.

THE FUNDS OF PLAINTIFF'S ASSIGNOR PAID TO WALKER BROTHERS DRY GOODS COMPANY WERE NOT HELD IN ANY SPECIAL DEPOSIT OR FUND, BUT WERE INTERMINGLED IN THE FUNDS OF THE CORPORATION AND USED IN THE OPERATION OF ITS BUSINESS. THE EMPLOYEES' SAVINGS "DEPOSITS" HAVE NOT BEEN TRACED INTO ANY FUND, SECURITY OR ASSET COMING INTO THE POSSESSION OF THE RECEIVER BUT ON THE CONTRARY, THE EVIDENCE AFFIRMATIVELY SHOWS THAT THEY WERE ENTIRELY DISSIPATED PRIOR TO THE APPOINTMENT OF THE RECEIVER. HENCE, EVEN IF THE "DEPOSITS" CONSTITUTED TRUST FUNDS, THE PLAINTIFF MUST FAIL BECAUSE HE CANNOT TRACE THE "DEPOSITS" IN THEIR ORIGINAL OR SUBSTITUTED FORM.

Assignments of Error Nos. 8, 10 (d and e) and 11 are the foundation upon which the discussion of the foregoing proposition rests.

The employee "deposits" after having been received by the company, were commingled indiscriminately with funds of the company received from its daily sales and other sources. (Abs. 53; Renshaw Trans. 39). These company funds were deposited daily in the banks, and in making up the deposits no distinction as to funds representing employees' savings and funds representing sales was made. They were all put together. The company had no special bank account in which the employees' savings were kept alone. (Abs. 53; Renshaw Trans. 39; Abs. 57; Renshaw Trans. 42). The employees' savings were not earmarked. (Abs. 54; Renshaw Trans. 40). The company maintained several banking depositories and when the credit balance in favor of the company in a particular bank would reach a certain point, a time certificate of deposit would be purchased from such bank. (Abs. 54; Renshaw Trans. 40; Abs. 58; Renshaw Trans. 43), but at no time was a certificate of deposit purchased which contained only the funds of employees which had been paid over to the company. (Abs. 57; Renshaw Trans. 42). These certificates of deposit were "emergency funds" and were intended to take care of "anything in an emergency." (Abs. 32; Trans. 36). There were no time certificates of deposit owned by the company on date of the appointment of the receiver.

They had all been cashed prior to that date and used in the company business. (Abs. 59; Renshaw Trans. 44).

The funds paid over to the company by Miss Frye were handled in the same manner as the funds paid to the company by its own employees. (Abs. 19; Trans. 25; Abs. 23; Trans. 27).

The defendant in its answer admitted that at the time of its appointment as receiver there came into its hands as such receiver "sums of money in excess of plaintiff's claim," but it denied that the assets of Walker Bros. Dry Goods Company coming into its hands as receiver were augmented by and to the extent of plaintiff's claim. (Abs. 4, 5, 6 and 7).

The legal principles involved in the situation presented by the evidence in this case cannot be subject to any serious dispute. The Supreme Court of Utah has definitely elucidated the rules of law which govern in this jurisdiction. The appellant therefore submits the following authorities, which support its position as set forth above:

> "The doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, *provided only he can identify them.* If they cannot be identified, by reason of the trust money being mingled with that of the trustee, then the cestui que trust is entitled to a charge upon the new investment to the extent of the trust money trace-

able into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position, and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account."

Sir Geo. Jessel, Master of the Rolls; quoted with approval in National Bank vs. Insurance Co. 104 U. S. 68, and adopted as the rule in Utah in Waddell vs. Waddell, 36 Utah 435; 104 Pac. 743.

"The courts have frequently considered and passed upon claims like the one before us, but we know of no case where it has been held that a trust could be impressed on property or funds where it is conceded to be impossible to trace or identify the property or funds, either in its original or substituted form * * *. It was not held in the Waddell case (36 Utah 435) nor in any other, so far as we are aware, that a court has ever impressed, or has attempted to impress, a trust upon certain property or upon a certain fund where the original trust property or trust fund can no longer be traced or identified, either in its original or substituted form."

Kent vs. Kent, 50 Utah 44, 165 Pac. 271, 15 L. R. A. (N. S.) 1100.

"Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the cestui que trust. No change in its state and form can divest it of such trust. So long as it can be identified, either as the original property of the cestui que trust, or as the product of it, equity will follow it; and

the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser, for a valuable consideration, without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fails. This is always the case when the subject matter is turned into money and mixed and confounded in a general mass of property of the same description."

Thompson Appeal 22 Penn. State 16.

"A trust creditor is not entitled to a preference over general creditors of the insolvent merely on the ground of the nature of his claim. To authorize such a preference, some specific recognized equity founded on the relation of the debt to the assets in the hands of the assignee or receiver, and which entitles the claimant, according to equitable principles, to a preference in payment out of those assets, must be established by evidence. The person claiming to be a trust creditor must in order to establish his right to a preference, trace the trust money into some specific property, fund, security, or account of the insolvent which has passed into the hands of the receiver or assignee, and the proceeds of which are to be distributed. He must identify the fund out of which he demands to be preferred in distribution either as the original trust property or as a product of it. * * * The right to pursue the fund fails when the means of identifying and ascertaining it fails."

Groff vs. City Savings Fund & Trust Co., 46 Penn. Superior Ct. 423;
Lifter vs. Earl Co. 76 Penn. Superior Ct. 173;

Corporation Commission v. Merchants Bank & Co., 138 S. E. 23 (S. C.).

"The authorities are generally agreed that the right of the cestui que trust to reclaim trust funds in specie, or impress a trust upon other property in the hands of the trustee, is founded upon the right of property and not on the grounds of compensation for its loss, and hence the beneficiary of a trust fund is not entitled, merely because of the character of its claim, to payments out of the insolvent trustee's assets in preference to general creditors, but must trace and identify the trust funds in order to reclaim them. * * * There are, however, well-established principles which govern the duties of a cestui que trust, as depositor in a bank, who seeks to trace and reclaim his fund. It is well settled that, when a trustee wrongfully commingles trust funds with his own funds, equity will impress the trust upon the entire mass with which the trust fund has been commingled in order to permit the reclamation of the trust fund. Waddell v. Waddell, 36 Utah, 435, 104 P. 743. The leading case in which the principles applicable to this situation were announced is the English case of In re Hallet's Estate, 13 Law Rep., Chancery Div. 696. There the rule was laid down, which has since been followed with almost unbroken uniformity, that the cestui que trust will not be called upon to identify particular money constituting his trust fund, but that, if the trustee has mingled the trust funds with his own, the entire mass is impressed with the trust to the extent of the amount of the trust funds, and where the trustee had made payments from the mingled fund he will be presumed to have expended for his own use and benefit, first, his own money, and, lastly, the trust fund, and that the cestui que trust will be permitted to recover from such mingled fund, and in prefer-

ence to common creditors, the amount of money representing the lowest balance to which the mingled fund fell from the inception of the trust to the date of insolvency. There may be some qualifications to this general rule, but, so far as this case is concerned, the principles stated are applicable. The rule is also stated as follows: "The same rule as to identifying or tracing the funds applies to public as to private funds. The money must be identified or traced into some other specific fund or property. There is a presumption, however, that what remains at the time of insolvency is a trust fund. The law presumes that trust funds were not appropriated and that a balance of cash in the hands of the depository is the trust funds." 22 R. C. L. 231.

In case the mingled fund is sufficient to pay the trust claimant in full, the presumption is that only the money of the trustee has been expended, but, where the trustee has expended, not only his own money out of the mingled fund, but has also dipped into and expended part of the trust fund, the trust claimant will be entitled to recover only the amount which remains, and he is entitled to recover this, even though the balance is less than the total of the trust fund."

Tooele County Board vs. Hadlock, 11 Pac. (2nd) at pgs. 324 and 325.

"But aside from this view of the evidence, the claim to a general charge upon any and all property acquired by the bank, through the use of the general funds of the bank with which this trust fund has been blended is not supported by the weight of authority; nor do the cases decided by this court go so far. That the misuse of this trust fund has gone to swell, in one form or another the general assets of the bank, is not enough to charge the whole with a lien, will not be seri-

ously contested. The cases which deny such a contention are numerous. *To impress a trust upon the property of a tort feasor who has used the trust fund in his private affairs it must be traced in its original shape or substituted form.*"

Crawford County vs. Strawn, 157 Fed. (C. C. A.) 1100, 15 L. R. A. (N. S.) 100; Schuyler vs. Littlefield, 232 U. S. 707.

"But we believe the majority doctrine is based upon sound principles and should be adhered to. Where no specific lien is created by contract, or acts of the parties, none exists. The only course open to equity is to discover the corpus of the trust fund or to follow the changes of transmutations of the trust moneys into some particular property or fund that can be charged with the trust, saving of course the rights of innocent purchasers for value."

Meyers, Receiver v. Matusek, 98 Florida at pg. 1145, 125 Southern 360.

"The result of these decisions is that merely showing that the trustee has received trust funds will impress a lien upon his assets unless it is shown that his assets were not increased by the misappropriation. But the great weight of authority is against this view."

Perry on Trusts (7th Ed) Sec. 836.

"When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in this tracing and following the trust money; but when as a matter of fact, it cannot be traced, the equitable right

of the cestui que trust to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own; and in such case the cestui que trust can only come in and share with the general creditors."

Little vs. Chadwick, 151 Mass. 109,
23 N. E. 1005, 7 L. R. A. 570.

"As a consequence there have been decisions in some American states to the effect that if one's general estate has been enriched by the proceeds of trust property, the trust may be established against the general assets even though the estate is insolvent. * * * But these cases have been either expressly overruled or greately limited and qualified. * * * In some states it has been held that, while it is not enough to show that the trust property went into the general assets, it is enough to charge the whole estate with a trust, if it can be shown that the proceeds remained unexpended somewhere in the estate. * * * But by the great weight of authority, a trust cannot be established against the proceeds of trust property, which has been disposed of, unless the proceeds can be identified and traced into some specific fund or property. This is the doctrine of In re Hallet's Estate (13 Ch. Div. 696) to which we have already referred."

Lowe v. Jones, 192 Mass. 94, 78 N. E. 42,
6 L. R. A. (N. S.) 487;
Atkins v. Atkins, 180 N. E. (Mass.) 613.

"Before a cestui que trust can claim specific real or personal property, he must show that it is

the identical property originally covered by the trust or that it is the fruit or product thereof in a new form."

Lathrop v. Bampton, 31 California 22.

"To justify a recovery a beneficiary must be able to follow and identify the property either in its original or substituted form."

Orcutt v. Gold, 117 Cal. 315, 49 Pac. 188;
Elizade v. Elizade, 137 Cal. 634, 66 Pac. 369.
Estate of Arms, 186 Cal. 554.
Holland v. Bank of Italy, 1 Pac. (2nd) 1031.

"It is not enough that the Estate of Lemon may have been indirectly increased by reason of his having used the trust fund to pay his own debts."

Martin v. Smith, 33 Idaho 692, 197 Pac. 823.

"The right of a beneficiary to reclaim a trust fund is based upon his right of property, not upon any right as a preferred creditor of the trustee."

Chase & Baker Co. v. Olmsted, 93 Wash. 306, 160 Pac. 952;
Heidelback v. Campbell, 95 Wash. 661, 164 Pac. 247.

"The proof does not definitely trace the proceeds of the sale of the converted property into the cash on hand or into any specific assets of the bank. It merely shows that the proceeds of these securities went into and swelled the assets of the bank, and thereafter they were used as all other assets in the ordinary operation of the bank. Under such circumstances, the judgment of the court

was erroneous in impressing a trust on the entire assets of the bank."

Tyler County State Bank v. Shivers,
6 S. W. (2nd) (Texas) 108;
Prior v. Davis, Administrator,
109 Alabama 117, 19 South 440;
Matter of Cavin v. Gleason, 105 N. Y. 256;
Maged v. Bank of United States,
234 App. Div. (N. Y.) 295, 254 N. Y. Suppl. 569;
Schneider v. Winchester Development Co.,
149 Atlantic (N. J.) 636;
Commonweath v. Tradesmen's Trust Co.,
95 Atl. (Pa.) 574;
O'Neil v. Cleveland, 223 N. W. (Wis.) 82;
Rainwater v. Wildman,
289 S. W. (Ark.) 488.

The testimony of Mrs. Chase and the plaintiff shows without qualification that all employees' savings deposits, after being intermingled and confused with corporate funds received from all other sources, were deposited in one or more of the banking depositories of the company. There was no special bank account to receive these employee deposits, and they were considered as part of the general funds of the company for use in its business activities. The evidence further shows that these bank credits were drawn upon without reference to the source of origin of the credits. The general obligations and expense of operation were paid from them, and when an employee "depositor" desired to "withdraw" any of his "deposits" they were given a check upon any of the depository banks without regard to the

source of the funds on credit. (Abs. 64; Renshaw Trans. 48).

On the assumption that Miss Frye's funds or savings when paid to the company became trust funds and not a debt (we have clearly demonstrated above the error of such assumption) the first step plaintiff is compelled to take is to trace these funds from the intermingled bank accounts where they had been confused with other corporation funds. This he apparently attempted to do by testimony of Mrs. Chase, and the plaintiff regarding time certificates of deposit. (Abs. 31, Trans. 35; Abs. 33, Trans. 36 and 37; Abs. 48, Renshaw Trans. 34; Abs. 51, Renshaw Trans. 36). In order to connect the employees' deposits with these time certificates of deposit plaintiff testified (Abs. 34; Trans. 37):

> "A. Well, we had those special deposits there to take care of the special accounts and other items as I stated before, those special accounts were the only liability we had that was due on demand."

Mrs. Chase stated (Abs. 51; Renshaw Trans. 36):

> "A. This is what I meant by 'emergency'; we had some employees that had, say as high as ten thousand dollars desposited, if they should want to draw that ten thousand out, but we didn't have the money in our *checking account, or in the till,* we could draw it out of this emergency account to pay them, this special account, if we had to do that".

From this and like testimony it is evident that plaintiff is attempting to claim that these time certificates of deposit were a trust fund to protect the employees' saving "deposits," but it should be noted that even on plaintiff's own evidence this position must fail, because

(a) Plaintiff in his own testimony admits these time certificates of deposit were "*a reserve account to take care of anything in an emergency*" (Abs. 32; Trans. 36) and "we had those special deposits there to take care of the special *accounts and other items* * * *" (Abs. 34; Trans. 37).

(b) Mrs. Chase states if "*we didn't have that money in our checking account or in the till*" we could draw it out of this emergency account to pay them (Abs. 51; Renshaw Trans. 36).

These statements belie the claim that the time certificates of deposit were a trust fund set up to protect the employees' saving "deposits", because they reveal two definite facts which in themselves contradict plaintiff's theory: *First,* the time certificates were to protect "*anything in an emergency*"; and secondly, "Withdrawals" by employees were made from these time certificates only if "*we didn't have that money in our checking account or in the till.*" How can it be successfully claimed that the time certificates were a trust fund for the benefit of the employee "depositors" when these two admissions are made?

However, aside from the intrinsic condition of plaintiff's evidence, plaintiff must depend upon Mrs.

Chase's testimony given below to show that the employees' saving funds went into the time certificates (Abs. 54; Renshaw Trans. 40):

> "Q. You didn't earmark that money so it would go right over to the Continental to pay a time certificate, did you?
>
> A. No.
>
> Q. You didn't earmark it so it would be Mr. Renshaw's to buy a certificate of deposit, did you?
>
> A. No.
>
> Q. But that went into the general account indiscriminately?
>
> A. Yes."

and also (Abs. 58; Renshaw Trans. 43):

> "Q. What was the practice in buying these time certificates of deposit, how often would you buy them?
>
> A. I don't remember.
>
> Q. Would you do the actual purchasing of them, or would Walker or Dreyfous, or who attended to that?
>
> A. Well, the Manager of the store would tell us when to get them.
>
> Q. And then you would draw a check on your general account?
>
> A. Yes, sir.
>
> Q. Depending, one time if the National Copper had a surplus balance, you would buy the certificate of deposit at that bank?
>
> A. Yes."

This evidence clearly shows that (a) time certificates of deposit were purchased from the general bank accounts of the company and that (b) no certificates were purchased which represented employees' "deposits" exclusively. It is left to guesses and surmises as to whether or not these time certificates of deposit were purchased with Mrs. Frye's funds. The chances are equal as to whether or not any of her funds went into the time certificates. Certainly there is no positive and direct evidence that such was the fact. The most favorable aspect of plaintiff's evidence at this point leaves it to a matter of conjecture.

If, however, we accept a pure assumption or guess that Miss Frye's funds went into time certificates, the next step in tracing the funds is wholly fatal to plaintiff's cause for note Mrs. Chase's evidence. (Abs. 59; Renshaw Trans. 44):

> "Q. You want your evidence to stand that at the time the receiver was appointed, there were no time certificates?
>
> A. No, none then."

and also (Abs. 60; Renshaw Trans. 44).

> "Q. But you know there were none in existence at that time?
>
> A. Not at the time of the receiver."

It is therefore plain that prior to the date the receiver was appointed, these certificates of deposit had

been cashed and the proceeds used in the transaction of the company business. *Certainly no time certificates came into the hands of the Receiver.* Thus ends plaintiff's trust fund search. He can go no further in his proof.

Under the authorities cited above and in accordance with the Utah rule, plaintiff must trace Miss Frye's money into some specific fund or property, and "where the original trust property or trust fund can no longer be traced or identified either in its original or substituted form" the trust fails and plaintiff stands as a general creditor. He cannot claim a lien on the general assets of the corporation, for the Utah Supreme Court has expressly and emphatically adopted the majority rule which refuses to extend the principle of tracing trust funds beyond its logical scope. The fact that receiver received "sums of money in excess of the plaintiff's claim" forms no basis upon which plaintiff can claim a lien upon the general assets of the corporation. The evidence shows that (a) Miss Frye's funds were intermingled and confused with the income from all other sources and thus confused were deposited in one or more of the company banks; (b) that it may be only conjectured that all or some part of Miss Frye's funds were used to purchase time certificates of deposit, and (c) all time certificates were cashed and used in the company business and none reached the hands of the receiver.

Under the rule announced in Utah in the Kent case (supra) and Tooele Bank case (supra) (and which is the

majority rule), plaintiff has failed to trace any of Miss Frye's funds into property or assets of the receivership estate, but contra has shown that if the funds found their way into the time certificates of deposit, all such certificates had been cashed and the proceeds expended prior to the appointment of the receiver. Hence, the so-called "trust fund" failed when the means of tracing it failed. His right to follow his alleged "trust funds" failed with proof that none of the certificates of deposit reached the receiver's hands. The certificates were the end of his trail. He made no proof that any of Miss Frye's funds were a part of the cash funds of the company which the receiver admits it received. His proof was directed towards the certificates of deposit and when his trail ran blind he cannot now retrace his steps in the direction of the undeposited cash funds of the company which the receiver secured on its appointment. Neither can the plaintiff point to the general assets of the company (of which the cash funds were a part) and claim a preferred lien thereon because he has no claim on the general assets (other than that of a common creditor) upon his failure to identify his alleged "trust funds" either in its original or transmuted form.

CONCLUSION.

From the foregoing discussion the following conclusions logically follows:

I.

The plaintiff, Walker, as assignee of Alice Frye, be-

came but a common creditor of Walker Brothers Dry Goods Company and he remained a common creditor at all times. His orders to the company concerning the balance of the Alice Frye account did not change this credit balance into a trust fund nor constitute the company trustee and himself cestui que trust.

II.

The funds paid by Alice Frye to the company were intermingled and confused in the general assets of the company and the plaintiff utterly failed to trace these funds into any asset or property coming into the hands of the receiver; hence his trust failed and he is relegated to the position of common creditor without preference.

In consideration of the foregoing it is submitted that the judgment in this case should be reversed, with instructions to the trial court to enter judgment adjudicating that plaintiff is but a common creditor without preference.

Respectfully submitted,

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